

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Representation Case Procedures

RIN 3142-AA12

**COMMENTS OF CALIFORNIA NURSES ASSOCIATION/
NATIONAL NURSES UNITED, AFL-CIO**

The California Nurses Association/National Nurses United (CNA/NNU) submits these comments in response to the National Labor Relations Board's Request for Information regarding its representation election regulations (the Election Regulations), with a specific focus on amendments to the Board's representation case procedures adopted by the Board's final rule published on December 15, 2014 (the Election Rule(s) or Rule(s)). The 2014 amendments to the Board's Election Regulations have improved the election process. Far from giving an advantage to either employer or union, the amendments have made the process more efficient and transparent. Accordingly, CNA/NNU asks the Board to retain without change the Election Rules.

The updated Rules have enabled the NLRB to operate more efficiently and consistently across the country. Three aspects of the Rules have proved especially effective. First, they have created clearer election timeline expectations for workers, unions, and employers alike, increasing accessibility and efficiency. Second, they have reduced unnecessary litigation and shortened the time required for the Board to process representation hearings. Third, they align the NLRB with present business and communication technology so that documents are timely filed and served electronically, including lists of employees in the bargaining unit the union is seeking to represent.

Comments by employer groups in response to this Request for Information have thus far

reflected concern that the current Rules have eliminated some of the means to stall an election, e.g., open-ended timelines to pre-election hearings and/or elections that allow for extended delays and lack of transparency, or the lack of requirement for disclosure of anything about the employer's position in response to the petition until the opening of a hearing, or the ability to force litigation on the eligibility of a classification which comprises only a small sector of the bargaining unit. This may be so, but it is as it should be. The current Rules thoughtfully address areas where employees seeking union representation have consistently encountered delays, while at the same time ensuring that both employers and unions have ample time to appropriately navigate the process. The current Rules set up a more efficient process that has better effectuated the mandate of the NLRA to protect employees' rights to union representation.

The Rule Fosters Transparency and Efficiency by, Inter Alia, Providing Clear Timelines for Pre-Election Hearings and Elections that are Defined, Yet Flexible.

Under the current Rule, there are clearer timeline expectations that help to streamline the election process and have created a more transparent and fair road to election. Under the current Rule, all parties have knowledge that, absent an election agreement, a pre-election hearing will be set eight days after a representation petition is filed. Equally helpful, the Employer's position statement in response to a petition can be expected by noon the day before the scheduled pre-election hearing. This has greatly assisted in providing clear expectations for both unions and employers, but more importantly, for workers. Ensuring that the pre-election hearing is scheduled promptly according to a set timeline and that workers and the union can expect to timely understand the employer's position has eliminated unnecessary uncertainty, confusion, and delay that, in the past, presented a hurdle to workers attempting to exercise their rights to organize.

While establishing clearer timelines, the Rule also allows flexibility to accommodate

where circumstances warrant extensions. For example, in Kaiser Permanente, 20-RC-188438, the Employer made a request for an extension of time to submit a Statement of Position and for a continuance of hearing, both of which were granted. The hearing was postponed by 6 calendar days and the Statement of Position submission deadline was extended 4 calendar days. This was to accommodate the Employer's lead counsel and upon consideration of holiday timing (the petition was filed near the Thanksgiving holiday). Thus, the Rule worked to provide all parties involved with a clear understanding of expected timing, but was not so rigid as to prevent Board discretion in making reasonable adjustments where appropriate.

The Rule further provides that the hearings are conducted on consecutive days. This again has supplied some much-needed predictability to a process that employees generally find confusing at best. Under the old rules, e.g., where an employer succeeded in getting a four to seven day hiatus between the first and second days of the pre-election hearing because of the previous commitments of employer counsel, employees tended to believe that the government was not really in charge and their employer was calling the shots. Additionally, in contrast to past practice, under the current Rule those employees providing testimony at hearings, or just wanting to attend and observe, now have better knowledge of the days for which they will need to make arrangements to appear.

Additionally, the Rule requirement that the parties orally argue their positions at the end of the pre-election hearing rather than submit briefs has also prevented delays and made the steps towards an election more transparent. And again, this requirement has not been instituted with such rigidity that would prevent alternative avenues available when appropriate. For example, in Kaiser Permanente, 20-RC-188438, because of timing constraints of the hearing and by mutual agreement of the Parties, the Regional Director authorized the parties to file post-hearing briefs,

due by the end of the business day following the close of the pre-election hearing. Closing oral arguments at the hearing would have pushed the hearing into the following day. To save time and resources, all parties involved agreed to submission of post-hearing briefs, limited by the Regional Director to 3 pages each.

The Rule Encourages Faster Resolution of Unit Issues and Avoids Unnecessary Pre-Election Hearings by, Inter Alia, Requiring a Timely Position Statement From the Employer.

The Rule requires employers to complete a Statement of Position form that the union is required to serve along with the petition. The requirement for a prompt Statement of Position acts to memorialize what Board Agents assigned to processing petitions have always tried to do. However, under the current procedures, employers can no longer stonewall the process by saying nothing to the Board Agent or the union about the issues the employer intends to litigate until the record opens in the pre-election hearing.

Prior to the implementation of the current Rule, NNU affiliates repeatedly experienced a refusal by employer counsel to disclose anything about the issues the employer intended to litigate, even in the off-the-record discussions immediately before the record is opened in the pre-election hearing. Often this nondisclosure was used by the employer for leverage in exacting the Union's agreement to an election at a much later date than employees or the union were expecting. In one especially egregious instance under the old Rule, when asked by union counsel what possible issues the employer could be seeking to litigate, a well-known employer counsel responded "We'll think of something." As further evidence, again in a recent election under the current Rules, different counsel for a separate Employer in negotiations for a stipulated election agreement bemoaned no longer being able to delay elections by months at a time through forcing hearing on otherwise non-controversial issues. These brazen comments demonstrate the abuse of

process that was prevalent under the old rules, and now curtailed under the current Rule.

The Statement of Position form is an effective mechanism for conserving the NLRB's resources and requires the employer to disclose only what it has already done in anticipation of the hearing. The Rule precludes the employer from continuing to "hide the ball" until the last possible moment to pressure the union to agree to a long delay before the election. Under the prior system, unions were sometimes forced to agree to elections further out from the petition filing date to avoid being subjected to even greater delays while the employer litigated, at length, non-material issues.

The Statement of Position also requires the employer to provide to the union a list of the names, work locations, shifts, and job classifications of all individuals in the proposed unit as well as all the individuals in any different unit that the employer claims is appropriate. Under old procedures, the employer could keep the union in the dark as to the number in the bargaining unit in which an election is to be held all the way until the *Excelsior* list was received, i.e., seven days after the approval of an election agreement or the Regional Director's Direction of an Election. In one election by an NNU affiliate, the union discovered that the bargaining unit was 100 nurses larger than expected only upon receipt of the *Excelsior* list. Despite a valiant effort to win the support of those 100 nurses, the union lost the election by a narrow margin.

The current Rule ensures that the union learns of the number in the proposed unit prior to the date of the hearing. This has greatly facilitated the parties' ability to enter into an agreement and avoid hearing where disputes can be amicably resolved with the proper information. For example, at West Anaheim Medical Center 21-RC-206408, the parties were able to avoid hearing and reach a stipulated election agreement, aided in great deal by the early provision of the initial list. When the Employer in that case made eligibility arguments in their initial position

statement, Union representatives had time to investigate on-the-ground prior to hearing, and ultimately the Union acceded to some of the Employer arguments about community of interest and agreed to exclude certain classifications from the final voter list without the need for a lengthy and resource-heavy hearing. Similarly, at Maine Coast Memorial Hospital 01-RC-209314, although the Employer refused to communicate prior to the date of the hearing about a potential stipulation, the parties never went on the record. Based on the provision of the initial list, the Union was able to vet all the potential job classifications prior to the start of the hearing with its witnesses. This allowed the parties to reach a stipulation regarding all eligible classifications without the necessity of proceeding to hearing.

The Rule Increases Efficiency by, Inter Alia, Requiring Limiting the Issues that can be Litigated to Material Factual Issues That Are Genuinely Disputed.

For those matters that do still require a pre-election hearing, the current rules reflect a dramatic improvement in setting forth the process to be followed by the Hearing Officer in identifying issues in dispute and then determining if there are genuine disputed material facts as to those issues. Where the employer's statement of position indicates that there may be material factual disputes, the Rules provide that the hearing officer takes offers of proof as to those issues. Where the offers of proof do not show genuine disputes of material fact, there will be no further hearing. Through this system, transparent delaying tactics, like an employer's instance on litigating whether the petitioning union is a labor organization within the meaning of Section 2(5) of the Act, go nowhere. By way of example, in St. Jude Medical Center, 21-RC-181746, the Hearing Officer, whose rulings were affirmed by the Regional Director when challenged by the Employer, limited the Employer to Offers of Proof on de minimis eligibility issues because they did not significantly affect the size or character of the unit sought by the Petitioner. This acted to limit unnecessary testimony on the record, which helped in yielding a quicker Decision and

Direction of Election.

Under the current Rule, employers are no longer able to insist on litigating, at great length, the eligibility of a classification which represents a small fraction of the bargaining unit. The Rules have created clearer guidelines for what is litigable pre-election, allowing Regional Directors the discretion to make decisions regarding de minimis eligibility issues, with uniform guidelines suggesting no litigation of eligibility issues affecting less than 20 percent of the proposed unit, or greater if the Regional Director deems appropriate. Such eligibility issues that the Regional Director determines should not be litigated at a pre-election hearing may be deferred for resolution post-election, if they are not mooted by the election results. This change in process has again minimized needless delays to election and has been effective in reducing unnecessary expenditure of resources by all parties and the Board in the pre-election hearing setting. In further evidence of the increased efficiency as intended by the current Rules, CNA/NNU has experienced on multiple occasions the mooted of any need for post-election litigation where minimal eligibility issues were deferred from pre-election hearings. As is now often the case, disputed employees permitted to vote subject to challenge are more easily resolved after the election has taken place. For example, at Barton Healthcare System, 32-RC-208599, a group of nurses whose eligibility was challenged by the Employer were permitted to vote subject to challenge, and after an overwhelming vote in favor of the union, the Employer and Union were able to amicably resolve the remaining disputed classifications in the unit without the need for any additional litigation. Such situations are not unique. There have been a number of RC elections with disputed eligible voter populations under 20% of the bargaining unit which, instead of being litigated prior to election, were permitted to vote subject to challenge, including at Maine Coast Memorial Hospital, 01-RC-209314; West Anaheim Medical

Center, 21-RC-206408; Shasta Regional Medical Center, 20-RC-204657; and Hospice of Southern Maine, 01-RC-196849. In none of the listed cases was the number of challenged voters potentially determinative of the election outcome because the Union by margins greater than the number of challenged ballots. And in each case, the eligibility of challenged classification was resolved at the bargaining table and no unit clarification petitions were filed. Additionally, at St. Jude Medical Center, 21-RC-181746, disputes over the eligibility of approximately 40 nurses from a bargaining unit which included another 745 people (as to whom the Employer and petitioner agreed) were mooted by the election results, where the Union lost its election by a margin wider than 40 votes.

The current Rule delineates the best practices that were already in place at various Regions and makes them uniform across all Regions. Requiring employers to identify at the start of the hearing issues the employer intends to litigate is eminently reasonable and has resulted in better use of the Agency's resources and fewer roadblocks to employees' seeking union representation. Likewise, providing clear guidelines on the threshold for eligibility disputes to be litigated has gone a long way in eliminating unnecessary hearing proceedings and refining the election process.

The Rule Further Streamlines the Process of Getting to an Election by, Inter Alia, Consolidating Reviews and Providing the Board with Broader Discretion in said Reviews

In contrast to past practice, the current Rules collapse the pre-election request for review process into the post election review process, thereby removing the 25 to 30 day minimum waiting period between a Regional Director's Order Directing an Election and the holding of that election. This has been a crucial piece of streamlining the election process.

Equally important, post-election review in circumstances where an employer wants to

challenge a Hearing Officer's decision on objections or determinative challenges is discretionary. The Board need not review the record unless the threshold requirements for granting review are met, in contrast to the prior system when exceptions were filed to a decision on objections or challenges. In further contrast to the past system, the current Rule requires that post-election hearings be scheduled within 14 days after issuance of the tally of ballots. As with the pre-election hearing, a predictable and prompt date for any post-election hearing reassures employees that their right to finality on their choice as to union representation cannot be undermined by employer maneuvering, as was so prominent prior to the effective date of the current Rule.

The Rule Appropriately Requires Employers to Use Electronic Technology in Providing Lists of Employees to Petitioning Unions and Expands the Information to Be Provided

The prior election Rule timelines were developed at a time when electronic communication did not exist. The timelines incorporated time for documents to be sent through the mail. The current Rule brings the Board process into the 21st century and properly reflects the fact that most employers today routinely conduct business electronically rather than through "snail mail," and typically store employee information electronically. The requirement under the current Rules that the list of eligible voters be provided to the NLRB and the petitioning union within two days after the Regional Director's approval of an election agreement or issuance of an order directing an election provides more than enough time under present day conditions for Employers to compile the information. Given that the list has already been provided to the union as a part of the Statement of Position, albeit without addresses or phone numbers, shortening the period to two days assists employees seeking union representation without imposing any onerous requirement on employers.

The electronic format of the voter list also assists in quicker identification of any issues or deficiencies in list details and is commensurate with the technology of today. The provision for electronic lists has created uniformity and eliminates confusion and unnecessary work which consistently arose in past elections where the employer provided the *Excelsior* list to a Board Agent electronically and copied the union, and then the NLRB formatted the electronic list and provided it to the union by fax or in a “pdf” file. In those past situations, the union would wind up with two different lists, formatted somewhat differently, creating confusion at the pre-election conference. The current Rule benefits all parties by eliminating these multiple lists.

The current Rule’s provisions requiring that the *Excelsior* list contain the additional information of employees’ personal phone numbers and e-mail addresses has also created greater uniformity and has afforded better informational exchange amongst employees. Limiting unions to communicating with employees by postal mail is out of step with the extent to which most people currently communicate by e-mail and is a barrier to open communications and information sharing that is so essential to the protection of Section 7 rights. Providing CNA/NNU with nurses’ phone numbers and e-mail addresses has fostered communication among nurses both as to the union campaign and as to patient care issues at their hospital. This greater communication among nurses benefits the public and creates a more equal playing field in terms of information dissemination, where employers in the past had access to the e-mail and phone number contact information of their employees but the union did not. Mandating that phone numbers and e-mail addresses be added to the *Excelsior* has gone a long way to update the Board’s rules to match modern communications technology. The fact that it may make it more difficult for an employer to shield employees from information about their representation options should be celebrated, not overturned.

Conclusion

CNA/NNU is committed to ensuring the organizing rights of its members and all workers and is a zealous advocate for the interests of patients, direct care nurses, and RN professional practice. As such, and for all the foregoing reasons, CNA/NNU supports the current Rules and urges their maintenance and enforcement. These modest changes in NLRB procedures have benefited employees who deserve a better process for exercising their rights to seek or refrain from union representation.

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Respectfully submitted,

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